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No. 87-602

In The
# Supreme Court of the United States
October Term, 1987

WILLIAM A. KILPATRICK, *et al.*,
*Petitioners,*

v.

UNITED STATES OF AMERICA,
*Respondent.*

**On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit**

## BRIEF OF PETITIONERS

WILLIAM A. COHAN*
JENNIFER A. GREENE
COHAN & GREENE
1801 York Street
Denver, Colorado 80206
(303) 321-0999

*Attorneys for Petitioners*
*William A. Kilpatrick*
*Declan J. O'Donnell and*
*Sheila C. Lerner*

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

## QUESTION FOR REVIEW

Whether a federal court may dismiss an indictment before trial based upon its supervisory powers without a finding of prejudice to the defendant in order to protect the integrity of the judicial system.

## PARTIES

The following parties were involved in the lower court decision:

WILLIAM A. KILPATRICK
DECLAN J. O'DONNELL
SHEILA C. LERNER
THE BANK OF NOVA SCOTIA
MICHAEL ALBERGA
C.S. GILL
UNITED STATES OF AMERICA



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(1) *United States v. Kilpatrick*, 575 F.Supp. 325 (D. Colo. 1983) (per Winner, J.).

(2) *United States v. Kilpatrick*, 594 F.Supp. 1324 (D. Colo. 1984) (per Kane, J.).

(3) *United States v. Kilpatrick*, 821 F.2d 1456 (10th Cir. 1987) (per Holloway, J. and Bohanon, J., with a dissenting opinion by Seymour, J.).

## JURISDICTION

The opinion of the court of appeals was filed on June 18, 1987. A timely filed Petition for Rehearing and Suggestion for Rehearing En Banc was denied on August 19, 1987. A timely filed Petition for Writ of Certiorari was granted, limited to Question 1 presented by petitioners, on January 11, 1988, and this Brief submitted by petitioners on the merits is timely filed. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

———o———

## CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

This case involves the Grand Jury and Due Process clauses of the Fifth Amendment to the United States Constitution, 18 U.S.C. §§ 6002 and 6003, Rules 6(d) and (e) of the Federal Rules of Criminal Procedure, which collectively constituted Appendix F of Petitioners' Petition for Writ of Certiorari, and the Sixth Amendment to the United States Constitution and 18 U.S.C. § 1503, which collectively constitute Appendix A of this Brief.

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## STATEMENT OF THE CASE

On September 24, 1984, the United States District Court for the District of Colorado, the Honorable John L. Kane, Jr., dismissed a twenty-seven count indictment charging seven individuals and the Bank of Nova Scotia



with conspiracy, mail fraud and tax fraud.[1] Unprecedented, deliberate and pervasive governmental misconduct requiring dismissal was painstakingly documented in two exhaustive district court opinions. *United States v. Kilpatrick*, 575 F.Supp. 325 (D. Colo. 1983; per Winner, J.); *United States v. Kilpatrick*, 594 F.Supp. 1324 (D. Colo. 1984; per Kane, J.). By a divided vote and in spite of a vigorous dissent, the United States Court of Appeals for the Tenth Circuit reversed the trial court and reinstated the indictment. In so doing the majority purportedly employed a "harmless error" test to excuse indisputably egregious and extensive governmental misconduct. "Harmless error" analysis requires that the reviewing court determine the cumulative effect of the misconduct was harmless beyond a reasonable doubt. The majority never did so, however, erring in two respects: (1) it required the defendants to demonstrate prejudice by repeatedly citing their failure to do so as grounds for reversal, instead of requiring the government to bear the burden of establishing that the misconduct was harmless, and (2) it failed to impose the standard of "harmless beyond a reasonable doubt" on the misconduct identified.

Accordingly, this case presents the Court with the opportunity to resolve crucial and recurring questions concerning the exercise of supervisory powers to deter governmental misconduct when such illegal activity is dis-

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[1] While several defendants were charged, this Brief is submitted on behalf of Defendant-Petitioners Kilpatrick, O'Donnell, and Lerner.

covered prior to trial. National media,[2] congressional hearings[3] and legal commentary[4] have focused public attention on the integrity of the criminal justice system, which has been seriously impugned by the government's outrageous and unlawful activities, compounded further by the unwarranted amnesty extended by the majority.

The district court dismissed the indictment prior to trial based on its supervisory power, utilizing the balancing test mandated by *United States v. Hasting*, 461 U.S. 499 (1983) and adumbrated in *United States v. Mechanik*, 475 U.S. 66 (1986). Judge Kane determined that some of the violations, standing alone, required dismissal, while others, not singularly requiring dismissal, when considered cumulatively amounted to a travesty. In concluding

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2 *E.g. 60 Minutes: U.S. vs. Kilpatrick* (CBS Television Broadcast, Jan. 13, 1985; Aug. 4, 1985); N.Y. Times, Jan. 22, 1984, at 1, col. 1; Washington Post, Jan. 25, 1984, at A2; National Law Journal, Jan. 30, 1984, at 1, col. 1; Legal Times, Feb. 6, 1984, at 1.

3 *See Oversight of IRS and Justice Department Prosecution of Several Tax Cases: Hearing Before the Subcomm. on Oversight of the Internal Revenue Service of the Senate Comm. on Finance*, 99th Cong., 2d Sess. 2, 311, 353 (Part 1 June 19-20, 1986) (statements of Senator William L. Armstrong; David Russell, President, National Association of Criminal Defense Lawyers; Peter F. Vaira, Partner, Lord, Bissell & Brook, and Vice Chairman, Grand Jury Committee, American Bar Association).

4 *See, e.g.*, J. Lawless, *Prosecutorial Misconduct*, §§ 2.11, 2.15, 2.16, 2.19, 10.3 (1985); 2 S. Beale & W. Bryson, *Grand Jury Law and Practice*, §§ 7:05, 10:02, 10:12, 10:22 (1987); Grand Jury Project, Inc., *Representation of Witnesses Before Federal Grand Juries*, §§ 11.2, 12.5, 13.4 (3d ed. 1985); T. Engel & D. Parker, *Release of Grand Jury Materials Under Rule 6(e) of the Federal Rules of Criminal Procedure*, 255, 267 (in *White Collar Criminal Practice 1985*, Litigation and Administrative Practice Series, Criminal Law and Urban Problems, Course Handbook Series No. 137 (PLI) (1985)).



that dismissal was compelled, the trial judge noted that even after the litany of lawlessness had been spread on the record, the government persisted in characterizing the criticism of the misconduct as "silly" and "frivolous." Dismissal of the indictment based on supervisory authority was deemed necessary to declare that such conduct was neither "silly" nor "frivolous," that it will not be tolerated, that it yielded an IRS investigation which was out of control and a grand jury which was little more than a rubber stamp: public confidence in the integrity of the criminal justice system requires no less.

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## SUMMARY OF ARGUMENT

The integrity of the criminal justice system is essential to the trust and esteem of the public, without which the system cannot continue to function. The supervisory powers doctrine is designed to safeguard the integrity of the criminal justice system from overzealous law enforcement. The focus under the supervisory powers analysis is on the harm to the system. This focus differs from due process or harmless error analysis which focus on whether the decision-maker's deliberations have been affected by the misconduct at issue. Only through the exercise of supervisory powers can the courts directly protect the system by removing the incentive to disregard the system's limitations on the powers of government. Neither the purpose behind the doctrine nor the analysis used thereunder require a showing of prejudice to the defendant.

Since harmless error analysis more narrowly concerns the interest of a particular appellant, not those of society in general, it focuses on the outcome of the controversy under review and the effect of the decision-maker's conduct on the verdict. It is appropriately applied in reviewing trial proceedings, where the error can be easily identified, traced and measured. The policies behind this type of analysis require a balancing of the costs involved in reversing a conviction against the quantity and quality of the error(s). Where there has been no trial and no conviction, harmless error analysis is inappropriate. Even assuming the errors can be quantified, the principal reason for harmless error analysis is to avoid reversing convictions because of the expense and difficulty of re-trial, the burden on witnesses, and the impression that convicts are able to flaunt the law: none of these factors are present when dismissal occurs prior to trial. Furthermore, in attempting to assess prejudice, the reviewing court may be compelled to engage in unguided speculation.

The Tenth Circuit's decision to reverse the pre-trial dismissal of petitioners' indictment inappropriately applies a harmless error analysis to the proceedings before the grand jury, finding defendants failed to show prejudice to the grand jury's independence. Furthermore, the harmless error analysis applied was faulty in itself, in that the court (1) required the defendants to prove prejudice, rather than requiring the government to prove its absence; (2) failed to determine whether the misconduct constituted harmless error beyond a reasonable doubt; and (3) mischaracterized dismissal of the indictment as a drastic remedy (thereby affording it too much weight),



when upholding the trial court's decision would mean simply that the government would have to obtain an untainted indictment.

The majority's superficial treatment of the facts yielded a finding of no prejudice, despite detailed and documented findings to the contrary by two district court judges and one dissenting appellate judge, who characterized the misconduct as patently prejudicial and egregious. The exhaustive factual findings of the district court display a laundry list of procedural irregularities and deceptive practices in violation of Fed.R.Crim.P. 6(d) and (e), the Fifth and Sixth Amendments, the immunity statutes, 18 U.S.C. § 1503, i.e. witness intimidation and more.

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## ARGUMENT

### PRE-TRIAL DISMISSAL OF AN INDICTMENT BY A FEDERAL COURT EXERCISING SUPERVISORY POWER DOES NOT REQUIRE PROOF OF PREJUDICE

### A. THE IMPERATIVE OF JUDICIAL INTEGRITY

Justice Brandeis articulated the *raison d'etre* for the supervisory power of the federal courts in an eloquent and oft-quoted dissent:

> In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto him-

> self; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this court should resolutely set its face.

*Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J. dissenting).

The case at bar concerns an indictment procured by government misconduct, which was concisely characterized by Circuit Judge Seymour in her dissent:

> It is beyond argument that the Government's conduct in this case was outrageous. As set out in two district court opinions, *United States v. Kilpatrick*, 594 F.Supp. 1324 [per Kane, J.] (D. Colo. 1984), and *United States v. Kilpatrick*, 575 F.Supp. 325 [per Winner, J.] (D. Colo. 1983), the record contains evidence constituting a laundry list of serious improprieties, most of which the majority neither disputes nor condones. [Kilpatrick Petition for Writ of Certiorari Appendix, (hereinafter "KA") 40a].

Over the last 50 years this Court has repeatedly invoked its supervisory power over the administration of criminal justice in the federal courts to protect the integrity of the court, rather than to vindicate the rights of particular defendants.[5]

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[5] *Young v. U.S. ex rel. Vuitton et Fils S.A.*, — U.S. —, 107 S.Ct. 2124, 2138 (1987) (exercise of supervisory powers is appropriate to determine procedures to be employed by courts in matters that directly concern function of judiciary); *Vasquez v. Hillery*, 474 U.S. 254 (1986) (serves to deter undermining the structural integrity of the grand jury system); *United States v.*

(Continued on following page)



Exercise of supervisory power is designed to compel respect for and obedience to constitutional and statutory rights and limitations on the powers of the government by removing the incentives to disregard them: in the instant case, dismissing the indictment serves to deter those who would employ lawless methods to obtain an indictment. *Elkins v. United States*, 364 U.S. 206, 217 (1960). Courts can protect the innocent against government misconduct by exercising supervisory powers to exclude evidence and dismiss indictments, even though the immediate beneficiaries of the courts' rulings frequently are guilty. *Brinegar v. United States*, 338 U.S. 160, 181 (1949) (Jackson, J., dissenting). This Court and countless lower courts have excoriated conduct that diminishes faith in the fairness of the criminal justice system in general. The narrow

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*Sells Engineering, Inc.*, 463 U.S. 418 (1983) and *United States v. Baggot*, 463 U.S. 476 (1983) (serves to deter threat to integrity of grand jury by disclosure for civil purposes); *United States v. Payner*, 447 U.S. 727 (1980) (serves to deter illegality and protect judicial integrity); *Stone v. Powell*, 428 U.S. 465 (1976) (constitutional obligation on courts to exercise supervisory powers serves to safeguard personal liberties and to uphold federal law); *Gerstein v. Pugh*, 420 U.S. 103 (1975) (serves to require procedures which safeguard against significant pretrial restraint of liberty); *Chapman v. California*, 386 U.S. 18 (1967) (serves to formulate authoritative laws, rules and remedies designed to protect against infractions by states of federally guaranteed rights); *Miranda v. Arizona*, 384 U.S. 436 (1966) (serves to formulate procedures to protect individual rights and integrity of criminal justice system); *Elkins v. United States*, 364 U.S. 206 (1960) (serves to deter lawless law enforcement activities); *Rea v. United States*, 350 U.S. 214 (1956) (serves to deter abuse of process by federal agencies); *McNabb v. United States*, 318 U.S. 332 (1943) (supervisory administration of criminal justice implies duty of establishing and maintaining civilized standards of procedures and evidence); *Berger v. United States*, 295 U.S. 78 (1935) (serves to deter prosecutorial misconduct).

focus of harmless error analysis is blind to this critical societal value.

> Prosecutors "have available a terrible array of coercive methods to obtain information," such as "police investigation and interrogation, warrants, informers and agents whose activities are immunized, authorized wiretapping, civil investigatory demands, [and] enhanced subpoena power." C. Wolfram, *Modern Legal Ethics*, 460 (1986). The misuse of those methods "would unfairly harass citizens, give unfair advantage to [the prosecutor's personal interests], and impair public willingness to accept the legitimate use of those powers." *Ibid.* Notwithstanding this concern, the determination whether an error was harmful focuses only on " 'whether there is a reasonable possibility that the [error] complained of might have contributed to the conviction.' " [citations omitted]. *A concern for actual prejudice in such circumstances misses the point, for what is at stake is the public perception of the integrity of our criminal justice system.* "[J]ustice must satisfy the appearance of justice," [citation omitted].

*Young v. U.S. ex rel. Vuitton et Fils S.A.*, — U.S. —, 107 S.Ct. 2124, 2139-40 (1987) (emphasis added).

The Bank of Nova Scotia (hereinafter "the Bank"), our co-petitioner, phrases its question before this Court in language limiting the purpose for exercising supervisory power to "protect[ing] the integrity of the grand jury process from and to deter *willful, repeated, and pervasive misconduct by government attorneys.*" (emphasis added). We agree with the Bank that: (1) there is sufficient evidence in the record to support the trial court's findings of willful, repeated and pervasive misconduct by government attorneys, and (2) those findings require dismissal of the



Indictment. But the record contains abundant evidence of additional improprieties occasioned by *reckless* misconduct of government attorneys and Internal Revenue Service (IRS) agents and *willful* misconduct by IRS agents which was also both repeated and pervasive. Although *reckless* misconduct by government agents and attorneys superficially presents a less serious threat to the integrity of the criminal justice system, there is no logical nor empirical basis for that conclusion.

While deliberate introduction of perjured testimony is perhaps the most flagrant example of misconduct, other prosecutorial behavior, even if unintentional, can also cause improper influence and usurpation of the grand jury's role.[6] The instant case involves a twenty-seven count indictment, twenty-six counts of which are predicated on 18 U.S.C. § 371, charging a conspiracy to impair, impede, obstruct and defeat a lawful function of the Internal Revenue Service: the computation, assessment and collection of income taxes. Section 371 is the most all-encompassing, amorphous and chameleon-like criminal law in existence in the United States of America. This Court has observed that indictments under the broad language of this statute must be scrutinized carefully because of the possibility, inherent in a criminal conspiracy charge, that its wide net may ensnare the innocent as well as the culpable. *Dennis v. United States*, 384 U.S. 855 (1966); *Krulewitch v. United States*, 336 U.S. 440 (1949).

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[6] *United States v. Samango*, 607 F.2d 877 (9th Cir. 1979); *United States v. De Rosa*, 783 F.2d 1401 (9th Cir.), *cert. denied*, 106 S.Ct. 3282 (1986); *United States v. Hogan*, 712 F.2d 757 (2d Cir. 1983); *United States v. Serubo*, 604 F.2d 807 (3d Cir. 1979); *United States v. Basurto*, 497 F.2d 781 (9th Cir. 1974); *United States v. Estepa*, 471 F.2d 1132 (2d Cir. 1972).

As stated in the opinion filed by the trial court on September 24, 1984:

> On February 21, 1983, I dismissed the first twenty-six counts of the indictment for *failure to charge a crime* and as improperly pleaded. [emphasis added] [KA 50a].

This order of dismissal was entered prior to any suggestion of prosecutorial misconduct. In reversing this ruling, the Court of Appeals apparently misapprehended the *ratio decidendi*, concluding cursorily:

> All the defendants contend, and the district court agreed, that the failure to allege the lack of economic substance of the underlying programs rendered the indictment fatally defective. We disagree. [KA 10a].

But the thrust of the argument and the rationale of the ruling did not rest on the failure of the indictment to allege a lack of economic substance (KA 11a); rather, the fatal defect determined by the trial court's February 21, 1983, dismissal arises from the same matrix identified by the Ninth Circuit in *United States v. Dahlstrom*, 713 F.2d 1423, 1428-29 (9th Cir. 1983):

> [T]he legality of the tax shelter program advocated by the appellants in this case was completely unsettled by any clearly relevant precedent on the dates alleged in the indictment. "It is settled that when the law . . . is highly debatable, a defendant—actually or imputedly—lacks the requisite intent to violate it." *United States v. Critzer*, 498 F.2d 1160, 1162 (4th Cir. 1974). A criminal proceeding pursuant to [the same statutes as the case *sub judice*] "is an inappropriate vehicle for pioneering interpretations of tax law." *United States v. Garber*, 607 F.2d 92, 100 (5th Cir. 1979).
>
> • • •



> These appellants were prosecuted in spite of the fact that no statute, regulation or court decision gave fair warning that advocacy of the . . . tax shelter [program] would result in a criminal prosecution if the challenged transaction might later be held to lack economic substance for purposes of a civil tax proceeding.

The Ninth Circuit held that prosecution of Dahlstrom and his co-defendants violated their first and fifth amendment rights because no crime was committed. In just the last two and one-half years the First, Seventh, Eighth, Ninth and Eleventh Circuit Courts of Appeals have dismissed indictments procured principally by the overzealous efforts of IRS agents because the acts and omissions alleged did not constitute criminal activity[7].

The significance of these decisions is two-fold: (1) Draconian application of the criminal law—particularly 18 U.S.C. § 371 and other statutes criminalizing offenses which are not *malum in se*—does not require willful, repeated or pervasive misconduct by government attorneys, i.e., recklessness and/or prosecutorial polarization of perspective are perhaps even more likely to ensnare the innocent; and (2) the criminal justice system can minimize this risk and maximize the trust and esteem of the public which is so essential to its effectiveness only through pre-trial dismissal of indictments obtained after significant viola-

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[7] *United States v. Gimbel*, 830 F.2d 621 (7th Cir. 1987); *United States v. Murphy*, 809 F.2d 1427 (9th Cir. 1987); *United States v. Larson*, 796 F.2d 244 (8th Cir. 1986); *United States v. Reinis*, 794 F.2d 506 (9th Cir. 1986); *United States v. Varbel*, 780 F.2d 758 (9th Cir. 1986); *United States v. Denemark*, 779 F.2d 1559 (11th Cir. 1986); *United States v. Anzalone*, 766 F.2d 676 (1st Cir. 1985).

tions of the legal limitations on law enforcement prerogatives.

We invite anarchy when we permit the government to act without scrupulous adherence to the procedural protections provided by: (1) the immunity statutes[8]; (2) the prohibition against adverse inferences from invocation of the privilege against self-incrimination[9]; (3) the limitations on persons present before the grand jury[10]; (4) the proscription against using the grand jury to gather evidence for civil purposes[11]; (5) the rules requiring secrecy of grand jury proceedings and anonymity of the subjects of inquiry[12]; (6) the laws criminalizing witness intimidation (18 U.S.C. § 1503)[13]; (7) the independence and impar-

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8 "Pocket Immunity" was provided to 23 witnesses and one was threatened with prosecution if his testimony was favorable to the targets. (KA 70a-74a).

9 After one grand juror informed the prosecutor that it was difficult to avoid drawing an adverse inference from one witness' refusal to testify on fifth amendment grounds, six more witnesses were paraded before the grand jury to make the same claim, and the prosecution falsely implied that Defendant Kilpatrick was paying their attorney's fees. (KA 74a-76a).

10 Numerous instances of tandem testimony by IRS agents, some in the absence of any attorney for the government, appear in the record. (KA 56a, 87a-88a).

11 A substantial amount of the evidence gathered via grand jury subpoenas was irrelevant to the criminal case and was disseminated to dozens of IRS personnel with no involvement in the criminal case. (KA 61a-64a, 88a-92a).

12 In addition to disclosures to civil IRS personnel, business associates of petitioners were advised of the subject matter and targets of the grand jury's inquiry, and secrecy obligations were imposed on targets' attorneys in violation of rule 6(e). (KA 64a-68a).

13 A tax law professor who testified as an expert that the tax shelters at issue were lawful was berated and intimidated in the presence of grand jurors. (KA 84a-85a).



tiality of the grand jury[14]; (8) the Sixth Amendment right to counsel, prohibiting post-indictment interrogation of defendants[15]; and (9) perjury statutes[16]. As Chief Justice Burger reflected in his opinion insisting on strict adherence to law by government agencies charged with duties of enforcement:

> The lines ascribed to Sir Thomas More by Robert Bolt are not without relevance here:
>
> > "The law, Roper, the law. I know what's legal, not what's right. And I'll stick to what's legal .... I'm *not God*. The currents and eddies of right and wrong, which you find such plain-sailing, I can't navigate, I'm no voyager. But in the thickets of the law, oh there I'm a forester . . . What would you do? Cut a great road through the law to get after the Devil? . . . And when the last law was down, and the Devil turned around on you where would you hide, Roper, the laws all being flat? . . . This country's planted thick with laws from coast to coast—Man's laws, not God's—and if you cut them down . . . d'you really think you could stand upright in the winds that would blow then? . . . Yes, I'd give the Devil benefit of law, for my own safety's sake." R. Bolt, *A Man for all Seasons*, Act I, p. 147 (Three Plays, Heinemann ed. 1967).

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14 IRS agents working for the prosecutor were sworn in as "agents of the grand jury," which was led to believe the agents' allegiance was no longer to the prosecution; these agents opined that the tax shelter program was unlawful. (KA 52a-57a).

15 Several violations of *Massiah v. United States*, 377 U.S. 201 (1964) were admitted by the government. (KA 100a-103a).

16 IRS agents purportedly "summarized" testimony, some of which was never given and critical portions of which were seriously misleading. (KA 55a-56a, 76a-81a).

*Tennessee Valley Authority v. Hill*, 437 U.S. 153, 195 (1978).

## B. PRE-TRIAL REVIEW RENDERS HARMLESS ERROR ANALYSIS INAPPROPRIATE

In *Ballard v. United States*, 329 U.S. 187 (1946) this Court determined that exclusion of women from a federal grand jury required dismissal of the indictment even after conviction at trial, holding that dismissal:

> does not depend on a showing of prejudice in an individual case . . . The injury is not limited to the defendant—there is injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts.

*Id.* at 195 (footnote omitted). *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975) extended this federal rule to the states, reasoning:

> The purpose of a jury is to guard against the exercise of arbitrary power—to make available the commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps overconditioned or biased response of a judge. [citation omitted] . . . [and] is also critical to public confidence in the fairness of the criminal justice system.

Limitation on the exercise of supervisory powers by application of a harmless error analysis was recently rejected by this Court in *Vasquez v. Hillery*, 474 U.S. 254, 261-262 (1986), a case which reversed a first degree murder conviction:

> Only six years ago, the Court explicitly addressed the question whether this unbroken line of case law [14 Supreme Court decisions from 1880 through 1972] should be reconsidered in favor of a harmless-error standard, and determined that it should not. [footnote and citation omitted]. We reaffirmed our conviction that discrimination on the basis of race in the selection of grand jurors "strikes at the fundamental values of our judicial system and our society as a whole, . . ." [citation omitted].



Two generations earlier the Court poured the foundation on which the current doctrine is constructed in *McNabb v. United States*, 318 U.S. 332, 340-43 (1943), reversing murder convictions:

> Judicial supervision of the administration of criminal justice in the Federal Courts implies the duty of establishing and maintaining civilized standards of procedure and evidence. Such standards are not satisfied merely by observance of those minimal historic safeguards for securing trial by reason which are summarized as "due process of law" and below which we reach what is really trial by force.
>
> * * *
>
> A democratic society, in which respect for the dignity of all men [and women] is central, naturally guards against the misuse of the law enforcement process. Zeal in tracking down crime is not in itself an assurance of soberness of judgment. Disinterestedness in law enforcement does not alone prevent disregard of cherished liberties. Experience has therefore counseled that safeguards must be provided against the dangers of the overzealous as well as the despotic.

Just last term the Court rejected harmless error analysis –again after conviction at trial—in *Young v. U.S. ex rel. Vuitton et Fils, supra*, at 2140-41, largely relying on the reasoning in *Holloway v. Arkansas*, 435 U.S. 475, 490-91 (1978):

> In the normal case where a harmless error rule is applied, the error occurs at trial and its scope is readily identifiable. Accordingly, the reviewing court can undertake with some confidence its relatively narrow task of assessing the likelihood that the error materially affected the deliberations of the jury. [citations omitted] .... [A]n inquiry into a claim of harmless error here [joint representation in criminal case caused conflict of interest for attorney] would require, unlike most cases, unguided speculation.

Given the numerous incidents of lawless governmental manipulation of the grand jury, there is no basis for believing that attempts to quantify prejudice here would be anything other than "unguided speculation."

Notwithstanding the substantial body of precedent rejecting both a requirement of prejudice and harmless error analysis in evaluating exercise of supervisory power, the majority of the court below relied on *United States v. Hasting*, 461 U.S. 499, 509 (1983) for its conclusion that:

> We remain convinced that the drastic remedy of dismissal of an indictment, whether premised on due process or supervisory powers theories, cannot be exercised without a significant infringement on the grand jury's ability to exercise independent judgment. [footnote omitted]. We are instructed clearly in *United States v. Hasting*, [*supra*] to ignore errors that are hramless, including most constitutional violations. [KA 39a].

The majority's characterization of dismissal as a "drastic remedy" is contradicted by cases reversing murder convictions based on supervisory powers, especially in view of the fact that the government was free to seek a supereeding indictment untainted by the indisputably



abundant abuses. As the Second Circuit observed, dismissing an indictment for prosecutorial misconduct:

> This would not let appellants go scot free, as there would be time to reindict them and have their guilt or innocence passed upon again on a record not tainted with irregularity. [citations omitted].

*United States v. Estepa*, 471 F.2d 1132, 1137 (2nd Cir. 1972).

Harmless error analysis in this case would require the reviewing court to affirm the dismissal of the indictment unless it could declare the misconduct harmless beyond a reasonable doubt, which the majority never did. Instead, the majority repeatedly relied on its conclusion that there was no proof of prejudice, impermissibly shifting the burden and changing the standard of proof.

Furthermore, *Hasting* provides little support for the majority's position. That case concerned prosecutorial misconduct consisting of a single reference during summation to testimony as uncontradicted where the defendant had elected not to testify and when he was the only person able to dispute the testimony.

> The opinion of the Court of Appeals does not make entirely clear its basis for reversing the convictions in this gruesome case [multiple kidnapping and repeated rape and sodomy]. Its cursory treatment of the harmless-error question and its focus on the failure generally of prosecutors within its jurisdiction to heed the court's prior admonitions about commenting on a defendant's failure to rebut the prosecution's case suggest that, notwithstanding the harmless nature of the error, the court acted in this case to discipline the prosecutor—and warn other prosecutors—for what it perceived to be continuing violations of *Griffin* [*v.*

*California*, 380 U.S. 609 (1965)] and § 3481. [which provides:

> In trial of all persons charged with offenses against the United States . . . the person charged shall, at his own request, be a competent witness. His failure to make such request shall not create any presumption against him.]

* * *

In view of this history of tension between what the Court of Appeals perceives as the requirements of *Griffin* and § 3481 and that court's view of the prosecutors' conduct, *we proceed on the assumption that, without so stating, the court was exercising its supervisory powers* to discipline the prosecutors of its jurisdiction. The question presented is whether, on this record, *in a purported exercise of supervisory powers*, a reviewing court may ignore the harmless-error analysis of *Chapman*. [*v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967)], a case that the Court of Appeals had, in fact, failed to cite. We hold that the harmless error rule of *Chapman*, . . . may not be avoided by an assertion of supervisory power, simply to justify a reversal of these criminal convictions.

* * *

> The goals that are implicated by supervisory powers are not, however, significant in the context of this case if, as the Court of Appeals plainly implied, the errors alleged are harmless. . . . Finally, deterrence is an inappropriate basis for reversal where, as here, the prosecutor's remark is at most an attenuated violation of *Griffin* and where means more narrowly tailored to deter objectionable prosecutorial conduct are available.

*Hasting*, at 504 (emphasis added) (footnotes omitted). *Hasting* presented the reviewing court with "the relatively



narrow task of assessing the likelihood that the error materially affected the deliberations of the jury." *See* excerpt from *Holloway v. Arkansas, supra.* In the instant case, immediately after a witness was called before the grand jury for the sole purpose of invoking his fifth amendment privilege to prejudice the grand jury, one of the grand jurors advised the prosecutor, "I know that we are not supposed to think anything when they take the Fifth Amendment; being human, we do." (KA 10a).

The trial court (Kane, J.) found:

> In all, seven witnesses were called to invoke their privilege in February and March, 1982. That the purpose was to prejudice the grand jury against the targets and the tax shelter transactions under investigation, and not to lay a statutory predicate for immunizing the witnesses (which the prosecutor never did) cannot be denied. [KA 74a].

This Court should note that the other six witnesses were called *after* the candid admission by the grand juror quoted above. Though *Hasting* certainly supports the proposition that supervisory powers should not be employed to circumvent the limitations of the harmless error doctrine, it does not support the obverse contention that harmless error analysis should be employed to circumvent the salutary limitations of the courts' supervisory powers when the goals thereby protected are implicated significantly.

As the majority acknowledged, dismissal of an indictment may be properly premised on either or both of two distinct theories: (1) the fifth amendment due process or grand jury clauses; and (2) supervisory powers. Con-

cerning supervisory powers the majority observed, after citing *Hasting*:

> The supervisory powers theory focuses on deterring illegality and protecting judicial integrity. [citations omitted]. However, the *common theme* of the cases is that prosecutorial misconduct alone is not a valid reason to dismiss an indictment. "An indictment may be dismissed for prosecutorial misconduct which is flagrant to the point that there is *some significant infringement on the grand jury's ability to exercise independent judgment.*" [citations omitted]. [emphasis in original] [KA 17a].

First, the majority omitted one of the three purposes identified in *Hasting* as justifying the exercise of supervisory power: to implement a remedy for violation of recognized rights. Second, the *common theme* of the cases decided by this Court is that significant infringement on the grand jury's ability to exercise independent judgment is difficult and unnecessary to determine when judicial integrity or the appearance of integrity is threatened by prosecutorial misconduct. As Circuit Judge Seymour stated in the court below:

> I respectfully dissent from the view of the majority that prejudice to the defendant must be shown before a court can exercise its supervisory powers to dismiss an indictment on the basis of egregious prosecutorial misconduct.
>
> * * *
>
> Although acknowledging most of the improprieties set out in the lower court opinions, the majority does not agree with the district court that the Government's actions impaired the grand jury's ability to exercise its independent judgment, which is *the standard that must be met before the indictment may be dismissed under the Fifth Amendment.* Significantly, the majority also concludes that the sanction of dismissing the indictment is not a proper exercise of a district court's supervisory power unless the same standard is met, that is, unless there is a legally sufficient showing that the Government's misconduct adversely affected the grand jury's independence. Putting aside whether the impact of the Government prosecutors' behavior on the decision-making process of this grand jury can realistically be evaluated, I do not believe that such a showing is a prerequisite to the pre-trial dismissal of an indictment under a court's supervisory power. [KA 40a-43a] [emphasis added].



The majority has anastomosed the doctrines of supervisory power, harmless error, and the due process and grand jury clauses of the fifth amendment; the resulting melange causes confusion which can only be resolved by exploring the implications of reducing supervisory power to a meaningless excresence on the body of due process doctrine.

Harmless error analysis has never been utilized to evaluate pre-trial errors, whether judicial or prosecutorial. The majority repeatedly relies on *United States v. Mechanik*, 475 U.S. 66 (1986) and *United States v. Hasting, supra*, as authority for the proposition that " '[t]he relevant inquiry focuses on the impact of the prosecutor's misconduct on the grand jury's impartiality, not on the degree of the prosecutor's culpability.' " [KA 19a]. This reliance is misplaced because both *Mechanik* and *Hasting* involved lengthy trials and single technical prosecutorial violations which were neither repeated nor pervasive, even assuming *arguendo* that the transgressions were willful. Harmless error analysis in those cases properly focuses

on the district court's: (1) refusal to dismiss one of more than 20 counts in an indictment *after* a three-month long *trial* for a single violation of rule 6(d) (*Mechanik*); and (2) refusal to declare a mistrial *after* a lengthy, expensive and traumatic *trial* involving several victim witnesses who were kidnapped and repeatedly raped and sodomized, based on a single "attenuated violation" of *Griffin v. California*, 380 U.S. 609 (1965) during closing argument (*Hasting*).[17]

The unstated premise of the majority's opinion is that any amount of prosecutorial misconduct is harmless because the petit jury's verdict constitutes the cure. The logical conclusion of this line of reasoning yields complete nullification of the grand jury's exculpatory role. As Justice O'Connor noted, concurring in *United States v. Mechanik*, *supra*, 475 U.S. at 73-74:

> The grand jury has two principal functions. First, it bears the weighty responsibility of investigating crime and determining whether there is probable cause to believe that a crime has been committed. *United States v. Calandra*, 414 U.S. 338, 343 (1974). The second, and no less important task of the grand jury is to "serve the invaluable function of standing between the accuser and the accused, whether the latter be an individual, minority group, or other, to determine whether a charge is founded upon reason or dictated by an intimidating power or by malice and personal ill will. *Wood v. Georgia*, 370 U.S. 375, 390 (1962).

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17 Harmless error analysis in the instant case should properly focus on the trial courts' orders of dismissal, not on the government's misconduct: if the district court erred, such error was harmless beyond a reasonable doubt because the only effect of any pre-trial error was to require the government to obtain an untainted indictment.



This Court's decision in *Mechanik* contains the following language from which the majority apparently extrapolated its position:

> The error involving Rule 6(d) in these cases had the theoretical potential to affect the grand jury's determination whether to indict these particular defendants for the offenses with which they were charged. But the petit jury's subsequent guilty verdict not only means that there was probable cause to believe that the defendants were guilty as charged, but also that they are in fact guilty as charged beyond a reasonable doubt. Measured by the petit jury's verdict, then, any error in the grand jury proceeding connected with the charging decision was harmless beyond a reasonable doubt.

*Mechanik*, 475 U.S. at 70. But the majority fails to recognize the rationale for *Mechanik's* ruling—a balancing test which weighs the societal costs of reversing a conviction against the quality and quantity of error: victims may be asked to relive their disturbing experiences, e.g., *Hasting*, *supra;* passage of time, erosion of memory, and dispersion of witnesses may render retrial difficult, even impossible; reversal may reward the accused with complete freedom from prosecution and thereby cost society the right to punish admitted offenders; even if a defendant is convicted in a second trial, the intervening delay may compromise society's interest in the prompt administration of justice and impede accomplishment of the objectives of deterrence and rehabilitation. The social costs of reversal and retrial are an acceptable and often necessary expense to correct errors which deprived the defendant of a fair determination of his fate at trial, but the balance tips the other way when the error had no effect on the outcome of the trial. *Mechanik*, *supra* at 72.

In the instant case, none of the criteria enumerated in *Mechanik* (which include those considered in *Hasting*) provide any weight to support the majority's decision. The force of *Mechanik* and *Hasting* solidly supports the trial court. Furthermore, the delay here has been occasioned solely by the government's decision to appeal the dismissal rather than seeking, *mutatis mutandis*, a superceding indictment by an untainted grand jury.

## C. PROSECUTORIAL MISCONDUCT WAS NOT "HARMLESS" BEYOND A REASONABLE DOUBT

It is syllepsis to apply harmless error analysis to prosecutorial misconduct when that doctrine is properly applicable only to judicial errors, i.e., mistakes by a presumptively impartial decision-maker such as a judge or grand jury. Errors caused by excessive zeal or deliberate design are actively encouraged when evaluated under a standard devised to excuse rather than deter. In the instant case the majority excused egregious prosecutorial misconduct on the basis that defendants had failed to show prejudice, characterizing their review as "harmless error analysis." This was error: harmless error analysis requires no showing of prejudice by defendants, but instead imposes on the reviewing court the duty to declare the errors "harmless beyond a reasonable doubt," which the Court of Appeals never did.

### I. Mistreatment of the Tax Law Expert Witness

The majority's disposition of "the trial court's finding that the prosecutor's mistreatment of a witness favorable to the defense prejudiced the defendants" is illuminating.



> We find the mistreatment of the witness, an expert on tax matters, unjustifiable. The mistreatment occurred during a recess but within the hearing of several grand jurors, witnesses, and attorneys. The district court's opinion, however, focuses entirely on the conduct of the prosecutor and not on any resulting prejudice to the defendants. We conclude that the defendants have failed to show how the grand jury's independence was breached. The defendants are hard put to argue that this incident in the course of a twenty-month investigation threatened the grand jury's independence. [KA 33a-34a].

Ironically, not only are defendants not hard put to argue that this incident significantly impaired the grand jury's independence, defendants have never been put to the trouble because the trial court concluded that the prejudice was patent. The attack on the tax expert was intended to impugn the validity and veracity of his testimony asserting the legality of the tax shelters at issue. The attack on Professor Hjorth followed the parade of witnesses who invoked their right to remain silent after the prosecutors had been advised of the prejudicial impact of that procedure on the grand jurors, an effect significantly exacerbated by the prosecutor's suggestion that the witnesses' reticence was produced by Defendant Kilpatrick's payment of their attorneys' fees. Earlier grand jury transcripts reflect colloquy between the prosecutors concerning Defendant Kilpatrick's association with a convicted felon attorney named Saul Davidson, which one grand juror admittedly considered as evidence of Kil-

patrick's guilt.[18] (GJ transcript March 2, 1982). The likelihood of prejudice becomes even more substantial in view of the fact that IRS agents Mendrop and Raybin had been ceremoniously sworn as "agents of the grand jury," an apocryphal "role" of which the jurors were repeatedly reminded, and testified to legal conclusions diametrically opposed to Professor Hjorth's. Assuming *arguendo* that harmless error analysis were appropriate, even the majority was unable or unwilling to assert that the errors were harmless beyond a reasonable doubt. *Chapman v. California, supra.*

Impairment of the grand jury's impartiality in this case is uniquely critical to the charging decision because the conflicting testimony of the tax law professor and the agents goes to the very existence of the crimes charged. *See United States v. Dahlstrom, supra; United States v. Garber,* 607 F.2d 92 (5th Cir. 1979); *United States v. Critzer,* 498 F.2d 1160 (4th Cir. 1974). As this Court explained in *Vasquez v. Hillery, supra* at 263:

> The grand jury does not determine only that probable cause exists to believe that a defendant committed a crime, or that it does not. In the hands of the grand jury lies the power to charge a greater offense or a lesser offense; numerous counts or a single count; and perhaps most significant of all, a capital offense or a noncapital offense—all on the basis of the same

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[18] *See Bruno v. Rushen,* 721 F.2d 1193 (9th Cir. 1983); *United States v. Hogan,* 712 F.2d 757 (2d Cir. 1983); *United States v. Ciambrone,* 601 F.2d 616 (2d Cir. 1979); *United States v. Samango,* 607 F.2d 877 (9th Cir. 1979); *United States v. Serubo,* 604 F.2d 807 (3d Cir. 1979); *United States v. Basurto,* 497 F.2d 781 (9th Cir. 1974); *United States v. Estepa,* 471 F.2d 1132 (2d Cir. 1972).



> facts. Moreover, "[t]he grand jury is not bound to indict in every case where a conviction can be obtained." *United States v. Ciambrone,* 601 F.2d 616, 629 (CA2 1979) (Friendly, J., dissenting). *Thus even if a grand jury's determination of probable cause is confirmed in hindsight by a conviction on the indicted offense, that confirmation in no way suggests that the discrimination [or, in this case, manipulation and misinformation] did not impermissibly infect the framing of the indictment and, consequently, the nature or very existence of the proceedings to come.* [emphasis added].

## II. Violations of F.R.Crim.P. 6(d)

Rule 6(d), F.R.Crim.P., delimits those who may be present in grand jury proceedings by the following explicit language:

> Who May Be Present. Attorneys for the government, the witness under examination, interpreters when needed and, for the purpose of taking the evidence, a stenographer or operator of a recording device may be present while the grand jury is in session, but no person other than the jurors may be present while the grand jury is deliberating or voting.

This Court in *Mechanik, supra,* rejected a *per se* rule of dismissal based on a single 6(d) violation in the process of obtaining a supercceding indictment, after a three-month trial, where the original indictment reflecting the same charge untainted by the 6(d) violation demonstrated the irrelevance of the 6(d) violation to the challenged count. The instant case involves pre-trial dismissal of an indictment—not a supercceding indictment—procured after many joint appearances by IRS special agents before the grand jury, often without the presence of government counsel. (KA 56a-57a). Furthermore, the agents were fre-

quently unsworn. The majority agreed with the trial court's findings of 6(d) violations, but held:

> [t]hat a *per se* rule of dismissal for Rule 6(d) violations as earlier applied in *United States v. Pignatiello*, 582 F.Supp. 251, 254-55 (D. Colo. 1984) (and cases cited therein), is no longer proper since *Mechanik*. We find no other circumstances showing that the violation of the Rule resulted in prejudice or infringement on the grand jury's independent functioning, as discussed below. Thus the dismissal for violations of Rule 6(d) without more cannot stand. [KA 24a].

Because of the district court's disposition, petitioners had no opportunity to show the possible impact of the 6(d) infractions. The majority's unwarranted expansion of this Court's ruling in *Mechanik* has converted a *per se* rule of dismissal into a *per se* rule of harmless error, effecting precisely the result presaged by Justice O'Connor, concurring in *Mechanik*, 475 U.S. at 73:

> I believe that the analysis adopted by the Court for determining the effect of a violation of the rules governing the conduct of grand juries effectively renders those rules a dead letter, thereby seriously undermining the grand jury's traditional function of protecting the innocent from unwarranted public accusation.

### III. Violations of F.R.Crim.P. 6(e)

The trial court devoted more than twenty pages of its opinion to detailed discussion of the government's numerous egregious transgressions of the four prohibitions contained in F.R.Crim.P. 6(e). (See full text of the Rule at KA 158a-159a).

During the course of the grand jury investigation, the government representatives systematically



disregarded the strictures of Rule 6(e). The record demonstrates that the responsibility and decision making authority that Rule 6(e) vests in government attorneys was relinquished to and exercised by the Internal Revenue Service. Members of that agency undertook a policy of determining whether and to whom disclosure of confidential material would be made and whether notification of such disclosure would be made pursuant to the Federal Rules. Moreover, the evidence suggests that information was disclosed to other IRS agents for use in civil cases. Grand jury secrecy was repeatedly breached by those with a duty to remain silent and secrecy obligations were imposed upon others of whom the law does not require confidentiality. [KA 58a].

#### (a) Disclosure

Disclosure notices filed pursuant to Rule 6(e)(3)(B) and hearings in the trial court establish that numerous individuals at all levels of the Internal Revenue Service who had no interest in anything other than civil tax collection were given access to grand jury material; furthermore, many of the recipients of the material have never been identified and still remain unknown. The IRS agents admitted that they, rather than the prosecutors, routinely decided which individuals would receive grand jury material, a violation of Justice Department rules acknowledged by the government. The government also admitted that the IRS agents, rather than the prosecutors, determined who among the recipients would be identified although all are required by Rule 6(e), which resulted in the omission of numerous required names and the identification of numerous other recipients without any explanation or justification. (KA 58a-59a).

This Court's recent decisions in *United States v. Baggot*, 463 U.S. 476 (1983) and *United States v. Sells Engineering, Inc.*, 463 U.S. 418, 431-34 (1983), demonstrate the gravity of the extensive episodes of 6(e) violations in this case, which frustrate every purpose identified in *Sells:*

> Not only is disclosure for civil use unjustified by the considerations supporting prosecutorial access, but it also threatens to do affirmative mischief. The problem is threefold.
>
> First, disclosure to Government bodies raises much the same concerns that underlie the rule of secrecy in other contexts. . . . If a witness knows or fears that his testimony before the grand jury will be routinely available for use in governmental civil litigation or administrative action, he may well be less willing to speak for fear that he will get himself into trouble in some other forum. [citation omitted].
>
> Second, because the Government takes an active part in the activities of the grand jury, disclosure to Government attorneys for civil use poses a significant threat to the integrity of the grand jury itself. If prosecutors in a given case [and *a fortiori* IRS agents unconstrained by rules for prosecutors] knew that their colleagues would be free to use the materials generated by the grand jury for a civil case, they might be tempted to manipulate the grand jury's powerful investigative tools to root out additional evidence useful in the civil suit, or even to start or continue a grand jury inquiry where no criminal prosecution seemed likely. Any such use of grand jury proceedings to elicit evidence for use in a civil case is improper *per se*. [citation omitted] . . . Our concern is based less on any belief that grand jury misuse is in fact widespread than on our concern that, if and when it does occur, it would often be very difficult to detect and prove. Moreover, as the legislative history discussed *infra*, Part III-B, shows, our concern over possible misappropriation of the grand jury itself was shared by Congress when it enacted the present version of Rule 6(e). Such a potential for misuse should not be allowed absent a clear mandate in the law.
>
> Third, use of grand jury materials by Government agencies in civil or administrative settings threatens to subvert the limitations applied outside the grand jury context on the Government's powers of discovery and investigation. While there are some limits on the investigative powers of the grand jury, [footnote omitted] there are few if any other forums in which a governmental body has such relatively unregulated power to compel other persons to divulge information or produce evidence. Other agencies, both within and without the Justice Department, operate under specific and detailed statutes, rules, or regulations conferring only limited authority to require citizens to testify or produce evidence. . . . To allow these agencies to circumvent their usual methods of discovery also would not only subvert the limitations and procedural requirements built into those methods, but would grant to the Government a virtual *ex parte* form of discovery, from which its civil litigation opponents are excluded unless they make a strong showing of particularized need.



Although accepting the district court's factual findings and acknowledging awareness of this Court's scholarly exegesis in *Sells Engineering* excerpted above, the majority rejected its reasoning, resorting to tautological and talismanic invocation of the shibboleth: "We fail to see how such a violation should result in dismissal of the indictment . . . Any misconduct was not so flagrant that the grand jury's independence was infringed." (KA 22a-23a, 24a, 26a, 28a, 29a, 30a, 31a, 32a, 33a, 35a, 36a-37a, 38a, 39a):

The district court points to the extensive disclosure of grand jury materials to IRS civil employees as well as the haphazard and *post hoc* method of identifying those to whom disclosure was made as probative of Rule 6(e) violations. 594 F.Supp. 1343-44. The court also cites as grounds for dismissal the "serious possibility" that IRS representatives improperly manipulated the grand jury to obtain materials for civil litigation purposes; the judge later found that the record "confirms that the grand jury's extraordinary powers and resources were, in part, initiated and channeled for just such a purpose." *Id.* at 1332 (footnote omitted). The court found also that the prosecutors showed a disregard for the secrecy provisions of Rule 6(e); that grand jury information had been disclosed in violation of Rule 6(e); and that a prosecutor had improper motives when he imposed unauthorized secrecy obligations on grand jury witnesses.

> [W]e fail to see how the grand jury's independence was usurped in such a significant way as to amount to grand jury abuse. *See Pino*, 708 F.2d at 530.
>
> Further, we do not see how the preparation of a catch-all disclosure list significantly infringed the grand jury's independence. [KA 29a-30a].

**(b) Improper Use**

The majority's truncated treatment of Rule 6(e) violations did not reject, but, rather, simply ignored District Judge Kane's detailed findings that:

(i) The IRS institutional intent to take advantage of the grand jury investigation in civil audits was confirmed by Richard Gullion, a civil IRS agent who candidly conceded that the IRS intended to utilize the fruits of the grand jury's investigation for that purpose (KA 61a):



(ii) IRS agents interviewed numerous tax shelter investors after referring the investigation to the Justice Department to obtain the investigative assistance of a grand jury because IRS administrative processes were potentially ineffective; the interviewees were threatened that if they did not speak voluntarily in lieu of a grand jury appearance, they would be subpoenaed to appear before that body (KA 62a);

(iii) the interviews were utilized to obtain information clearly relevant to civil tax collection, but irrelevant to the grand jury's inquiry, a conclusion clearly corroborated by the fact that none of the interviews, none of the interviewees, nor any results therefrom was ever presented to the grand jury—nor did the government ever proffer any purpose for the interviews (KA 63a);

(iv) utilizing the grand jury material, IRS civil audit personnel performed audits, none of which was presented to the grand jury, again without explanation by the government; subsequent to the indictment the IRS has issued civil audit letters to the interviewees-investors, notifying them that their returns were being examined and advising them that "[a] report will be issued in the near future containing a position consistent with facts as presented to the Federal Grand Jury Indictment of September 30, 1982 for the United States District Court for the District of Colorado" (KA 63a-64a); and, finally

(v) the entire case was permeated by prosecutorial vindictiveness (KA 64a).

Each of the three purposes identified by this Court in *Sells Engineering* was thoroughly frustrated by the undisputed misconduct of the government in this case, all of

which was obfuscated by the majority's reference to its inability to see how the grand jury's independence was compromised.

### (c) Secrecy Violations

Third of the four types of Rule 6(e) infractions found by the trial court in this case were deliberate disclosures designed to embarrass the targets, interfere with the operation of their businesses, and gain an advantage in connection with the intended prosecution. Letters typed on United States Attorney's letterhead were sent to individuals beyond the subpoena power of the grand jury with whom it was understood the targets had ongoing business relationships.[19] District Judge Winner responded to revelation of these letters by observing:

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[19] The letters stated in pertinent part:

*The United States Department of Justice is conducting a Grand Jury investigation of . . . William A. Kilpatrick, Declan J. O'Donnell, John Pettingill and Sheila C. Lerner* for the years 1977 through 1980. The Grand Jury is attempting to determine whether these individuals, through United Financial Operations, Inc., P & J Coal Company, Inc., Marlborough Investments, Ltd., International Fuel Development Corp., Ltd., and International Block Construction Company, Ltd., have committed violations of Title 18 and Title 26 of the United States Code.

*The Grand Jury has obtained information which indicates that you have had and/or currently do have a business relationship with one or more of the individuals and/or entities listed above.* It has been determined that your testimony will be helpful in resolving questions which still face the Grand Jury. Subsequently, [sic] the United States Department of Justice cordially invites you to appear and to testify before the Federal Grand Jury in Denver, Colorado (U.S.A.) at your con-

(Continued on following page)



> [T]he identity of the persons and transactions under grand jury scrutiny shouldn't be disclosed to anyone by letter or otherwise, but these startling letters did precisely that. [KA 66a-67a].

Prejudicial disclosure of the targets and the nature of the grand jury investigation was not limited to these "startling letters"; additional disclosures were made to investors and, on one occasion, to a prospective target to induce his cooperation. (KA 67a).

### (d) Improper Imposition of Secrecy Obligations

Finally, in clear violation of F.R.Crim.P. 6(e)(2) and for an improper strategic purpose, the government purported to impose secrecy obligations on two grand jury witnesses, David H. Hoff and David R. Major, as evidenced by the following colloquy contained in transcripts of grand jury proceedings on January 5, 1982:

> **Q: You are also aware that the proceedings of this Grand Jury are secret and that is covered by Rule 6 of the Federal Rules of Criminal Procedure, that is,**

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(Continued from previous page)

venience. Transportation, lodging and meals will be arranged for and paid by the United States Department of Justice.

* * *

We look forward to your response,

Sincerely yours,

Stephen L. Snyder
Trial Attorney
Criminal Section
Tax Division
By Paul E. Raybin
*Special Agent*

(KA 65a-66a).

> any questions I put to you today, questions that the Grand Jury may have, any discussion we have in this room at your appearance, that your appearance should be kept secret by you; do you understand that?
>
> A: Yes, sir, I do. [KA 68a].

The trial court specified that: the 6(e) violations were neither innocent nor inadvertent; Messrs. Hoff and Major were attorneys who had represented Petitioners Kilpatrick and O'Donnell in previous SEC proceedings involving the same tax shelters under investigation by the grand jury; the interrogation of the lawyers focused directly on the contents of privileged communications between them and their respective clients, Kilpatrick and O'Donnell; the purpose of the unauthorized secrecy obligations was to prevent Kilpatrick and O'Donnell from learning of any possible violations of their attorney-client privileges in order to foreclose any challenge to such testimony. (KA 68a-69a); and the government never offered a legitimate explanation for the activity, which violated the United States Attorneys' Manual at § 9-11.362. (KA 94a-95a).

The trial court, Kane, J., held:

> [t]hat where violations of Rule 6(e) are intentional or reckless and systemic, the sanction of contempt is insufficient and dismissal of the indictment is warranted. *Under such circumstances, it is not necessary for the defendant to show that he has been prejudiced by the violations. In the instant case, however, such showing of prejudice has been convincingly made.* [KA 95a] [emphasis added].

To all of the trial court's findings of fact and conclusions of law, the majority responded:



(a) the district court's factual findings as well as the legal conclusions drawn were in error (KA 20a);

(b) the indictment was the product of an independent grand jury and thus valid (KA 20a);

(c) the district court's dismissal for violations of Rule 6(d) without more cannot stand (KA 24a);

(d) insofar as the district court relied on reckless and systematic violations of Rule 6(e) as *per se* grounds for dismissal, we hold that such Rule 6(e) violations *ipso facto* do not justify dismissal (KA 26a);

(e) assuming unauthorized disclosure, disregard for secrecy required by Rule 6(e), improper motives for imposing unauthorized secrecy and noncompliance with the rule requiring identification of all persons given access to grand jury material, "we fail to see how the grand jury's independence was usurped in such a significant way as to amount to grand jury abuse." (KA 29a-30a).

### IV. Use of Pocket Immunity

During the course of the investigation twenty-three witnesses were provided with so-called "pocket immunity" contrary to the explicit provisions of 18 U.S.C. §§ 6001 *et seq.* (KA 70a.) None of the witnesses thus immunized ever indicated an unwillingness to testify without immunity, a statutory prerequisite to immunity; ironically, prosecutors never sought immunity for the only witnesses who satisfied this statutory predicate, and who were compelled to invoke the fifth amendment before the grand jury. (KA 71a). The grand jurors were given conflicting explanations for the purposes and effects of this "immunity," thereby impairing their ability to assess credibility. (KA

72a-73a). Moreover, the "informal immunity" provided by the prosecutors left every "immunized" witness fearful that, unless their testimony pleased the government, the government could withdraw the immunity and prosecute the witness. (KA 73a).

The most detailed example of this problem was described in Judge Winner's opinion, involving one Richard Bell, a witness who testified with a "Letter of Assurance":

> Mr. Bell was represented by his brother Malcolm, an attorney practicing in New York City, and a witness I found to be straight-forward, fair, convincing, and most generous to [the prosecutor]. Malcolm Bell succumbed to the carrot of pocket immunity for his brother, but, later he was told [by the prosecutor] that if Richard [Bell] 'testified for Mr. Kilpatrick, all bets were off.' Maybe this meant that if Mr. Bell perjured himself he would be prosecuted for perjury, but if the immunity statute had been followed, the nagging question of the meaning of 'all bets are off' wouldn't confront us. 575 F.Supp. at 335. [KA 73a].

The district court held that the repeated use of letters of assurance or so-called "pocket immunity" violated 18 U.S.C. §§ 6001 *et seq.* and tainted the grand jury indictment. (KA 98a). The majority rejected this conclusion, holding that "the use of 'informal immunity' which has been frequently upheld, is entirely proper. (citation omitted). Moreover, the defendants have failed to show how the use of informal immunity prejudiced the grand jury." (KA 28a). This Court should note that the trial court did not dismiss the indictment solely for the use of pocket immunity in violation of 18 U.S.C. §§ 6002 and 6003, but considered these infractions under the "totality of circumstances test." (KA 103a-104a, 107a).



## V. Violations of the Sixth Amendment

In February of 1983, more than four months after the indictment was returned, one of the government's prosecutors travelled to Puerto Rico to interrogate Malcolm Haynes, an employee of the Bank of Nova Scotia, in the hope of questioning Haynes in the absence of the Bank's attorneys. After conducting surveillance of Mr. Haynes' two daughters, aged eight and ten years, at the school they attended, thereby locating their mother in order to violate Mr. Haynes' spousal privilege, the prosecutor wrote a letter to Mrs. Haynes soliciting her cooperation in obtaining Mr. Haynes' assistance, again in the hope that counsel for the Bank would not be notified. (KA 82a-84a). This flight of fantasy, albeit in admitted violation of *Massiah v. United States*, 337 U.S. 201 (1964) and *Brewer v. Williams*, 430 U.S. 387 (1977), which was "explained" on the basis that the worst to be expected from the constitutional violations would be a limited suppression of evidence, drew relatively little attention from the courts below. The trial court held that no prejudice had been shown, but allowed as how the violations entered into the general qualitative assessment of government misconduct. (KA 100a-103a).

In the two short sentences devoted to the topic by the majority, it determined that even this limited consideration of the *Massiah* violations by the trial court was error (KA 28a), notwithstanding the "totality of the circumstances test" approved by the majority. (KA 26a).

## VI. "Summaries of the Evidence" by Self-Proclaimed Agents of the Grand Jury

As found by the trial court, despite detailed instruction from the impaneling court that the grand jury should

maintain its independence and not become an "agent of the prosecution," shortly after both grand juries had been impaneled the prosecutors created the office of "agent of the grand jury" for IRS Special Agents Mendrop and Raybin, who had been assigned by the IRS to assist the prosecutors. Several months after the second grand jury began its inquiry, the office of "agent of the grand jury" was conferred on another IRS agent named Schneider, who testified as an expert concerning the tax shelters here at issue. In all three cases the IRS agents were inaugurated as "agents of the grand jury" by the prosecutor's administration of an oath he had invented before the grand jury, which was done for the sole purpose of misleading the grand jury as to the loyalty and credibility of these IRS agents. Notwithstanding the admitted facts that the office of "grand jury agent" was a government fabrication, the grand jurors were repeatedly urged to rely upon the testimony of these men as that of *their* agents, rather than that of agents of the prosecution as they in fact were. (KA 52a-53a). Agents Mendrop, Raybin and Schneider did not merely assist the prosecutors; they testified to their legal conclusions, which were, not surprisingly, that the tax shelters were blatantly illegal. (KA 54a-55a). To compound the false impression intentionally created in the minds of the grand jurors concerning the agents' credibility, Messrs. Mendrop, Schneider and Raybin purported to summarize the evidence for the grand jury to support the twenty-seven count indictment presented by the government attorneys. These summaries contained numerous inaccuracies and were misleading in several respects. (KA 56a).



The government falsely asserted that the "evidence" indicated that the Bank of Nova Scotia representatives were familiar with Mr. Kilpatrick's business operations and that the banking activities had defrauded the IRS. Although no evidence of the kind suggested by the prosecutor had been presented, Agent Mendrop was introduced to the grand jurors as one who was to "summarize" and "just walk through, one more time, and refresh your memory," immediately prior to presenting the indictment for the grand jurors' endorsement. (KA 76a-77a). In particular, Mendrop purported to "summarize" in connection with the bank's role the testimony presented by three witnesses: Messrs. Waters, Ros and Charles. Scrutiny of the grand jury testimony, however, disclosed that Mendrop was not summarizing evidence before the grand jury: one of the witnesses whose testimony was "summarized" never appeared before either grand jury and the other two witnesses whose testimony was "summarized" did not give testimony even remotely resembling Mendrop's putative "summaries." (KA 77a).

The district court's opinion includes an exhaustive analysis and discussion of the transcripts containing the office and pseudo-investiture of the three grand jury agents and their false and misleading testimony on crucial issues, covering some fifteen pages. (KA 52a, 57a, 76a-81a, 87a-88a, 90a, 99a-100a). The majority's treatment of the trial court's determinations on these two issues—quoted in its entirety—is astonishing:

> We are not persuaded by the several reasons given for the dismissal. First, summaries of evidence given before the grand jury are permissible and often helpful, especially in complicated cases such as this. [This

is synecdoche: the issue was not whether, generally, "summaries are permissible," but rather whether *the false summaries in question* were "harmless beyond a reasonable doubt."] It must be remembered that this complicated tax fraud case spanned twenty months and involved two grand juries. Moreover, the district court is prohibited from looking behind the indictment to determine if it was based on inadequate or incompetent evidence. *Costello*, 350 U.S. at 363, 76 S.Ct. at 408; *see also United States v. Kysar*, 459 F.2d 422, 424 (10th Cir. 1972). fn.12.

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fn. 12 We note that no claim was made nor did the court find that the government attorneys used perjured testimony, knowingly, or unknowingly, before the grand jury.

[KA 27a-28a].

Whether characterized as catachresis or casuistry, the majority's refusal to recognize the significance, nature and extent of the indisputably false testimony disguised by the "grand jury agents" as "summaries" constitutes a catastrophe. The failure to employ the parameters proper to supervisory power is, presumably, ineluctable.

> The district court found that the use of the title "agents of the grand jury" by IRS agents misled the grand jury. [footnote omitted]. However, "Fed.R. Crim.P., contemplates the use of government agents, such [as] IRS agents, to assist an attorney for the government in his handling of a grand jury investigation." [citation omitted]. We need not decide here whether the use of "grand jury agents" violated the Rule 6 prohibition against unauthorized presence or unauthorized disclosure. [footnote omitted]. There is no showing by the defendants as to how this record reveals any actual prejudice to them in the proceedings by overreaching the grand jury or usurping its independence through this conduct. [KA 32a-33a].



## CONCLUSION

As discussed in Section C.I., *supra*, the unjustifiable mistreatment of the tax law professor discredited his opinion and the fraudulent attempts to accredit the "agents of the grand jury" were designed to remedy the critical weakness in the government's case:

> [T]he legality of the tax shelter program . . . in this case was completely unsettled by any clearly relevant precedent on the dates alleged in the indictment. "It is settled that when the law . . . is highly debatable, a defendant—actually or imputedly—lacks the requisite intent to violate it." [citation omitted].

*United States v. Dahlstrom, supra*, at 1428.

In contrast to what is permitted under other legal systems, the Constitution of the United States requires that before any person is held accountable for committing a crime, the crime with which he is to be charged must be clearly and succinctly defined to give fair warning. *United States v. Anzalone, supra* at 678; *Kolender v. Lawson*, 461 U.S. 352, 357 (1983).

Just like it did to the *Dahlstrom* defendants, the government violated the first and fifth amendment rights of these petitioners by bringing this indictment. The parade of witnesses invoking their rights to remain silent coupled with the suggestion that defendants were paying for that silence was another ploy to supply the missing ingredient

in the government's presentation: evidence of specific intent. The government misconduct condemned in *United States v. Roberts*, 481 F.Supp. 1385, 1389 (C.D. Cal. 1980) (attempting to discredit and slant the testimony of defendant's exculpatory witness; *cf.* mistreatment of Professor Hjorth); *United States v. Samango, supra*, at 882-83 (presentation of inaccurate informant testimony and hearsay provided by DEA agent laden with conclusions as to defendants' guilt; *cf.* Mendrop, Raybin and Schneider), and *United States v. Hogan, supra*, at 761 (accusations made, not to support additional charges, but in order to depict defendants as bad persons and thereby obtain indictment; *cf.* attack on defendants' tax law expert and suggestion that defendants purchased silence of seven witnesses), pales by comparison to the governmental misconduct catalogued by the trial courts in this case.

The majority compounded its inability to see obvious potential prejudice by improperly and repeatedly shifting the burden of proof to the petitioners: once a *prima facie* showing of constitutional error is made, the burden shifts to the government to demonstrate that such error is harmless beyond a reasonable doubt. *Rose v. Clark*, — U.S. —, 106 S.Ct. 3101 (1986); *Francis v. Franklin*, 471 U.S. 307 (1985). But in applying this standard to a case involving serious supervisory powers implications, the error must not only be harmless to the defendants, it must be harmless to the integrity and the appearance of integrity of the criminal justice system. Here the majority substituted "insubstantial findings of fact to screen reality" and thereby defeated guarantees in the Bill of Rights and denigrated the appearance of justice. *N.A.A.C.P. v. Claiborne Hardware*, 458 U.S. 886, 924 (1982). The district



court's meticulous factual analysis to support its conclusions "that the grand jury's function was usurped and that the indictment was tainted with illegality," was vitiated by the majority's holding "that if those determinations are ultimate fact-findings, they are clearly erroneous in light of the record;" this constitutes "insubstantial findings of fact screening reality." This Court should demonstrate the proper and appropriate exercise of supervisory powers by reversing the Court of Appeals, reinstating the district court's judgment, findings of fact and conclusions of law, and restoring a measure of integrity to our criminal justice system.

Respectfully submitted,

WILLIAM A. COHAN*
JENNIFER A. GREENE
COHAN & GREENE
1801 York Street
Denver, Colorado 80206
(303) 321-0999

*Attorneys for Petitioners*
*William A. Kilpatrick*
*Declan J. O'Donnell and*
*Sheila C. Lerner*

*Counsel of Record

# APPENDIX A

*Amendment VI, United States Constitution*

*Rights of the accused.*

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

*United States Code and Service*
*Section 1503*

*Influencing or injuring officer or juror generally.*

Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States commissioner [magistrate] or other committing magistrate, in the discharge of his duty, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account or his being or having been such juror, or injures any such officer, commissioner [magistrate], or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any

threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more than $5,000 or imprisoned not more than five years, or both.